LIBRARY
SUPREME COURT U. S.

Office Supreme Court, U.S.
FILED
JUN 23 1962
JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1961

No. 75

TECON CORPORATION,
PETITIONER,

v.

SECRETARY OF THE TREASURY OF THE COMMONWEALTH OF PUERTO RICO,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

BRIEF FOR RESPONDENT IN OPPOSITION

ARTURO ESTRELLA
Acting Solicitor General
RODOLFO CRUZ CONTRERAS
Assistant Solicitor General
Attorneys for Respondent

Blanchard Printing Company, Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
As to the case decided on January 4, 1962	3
As to the case decided on January 19, 1962	3
Statement	3
Argument	6
Case Decided on January 4, 1962	6
Case of January 19, 1962	9
Reasons why certiorari should be denied	10
Conclusion	12
Appendix	13
Statutes, as to Case Decided on January 4, 1962	13
Statutes, as to Case Decided on January 19, 1962	14

TABLE OF CITATIONS

Cases

Black v. *Cutter Laboratories*, 351 U.S. 292, 298 (1956)	11
Chicago, Indianapolis & Louisville Mfg. Co. v. *McGuire*, 196 U.S. 128, 132	11
Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938)	11
Greenough v. *Tax Assessors*, 331 U.S. 486, 497 (1947)	11
Hanson v. *Denckla*, 357 U.S. 235, 243 (1958)	11
Hiawassee Power Co. v. *Carolina Tenn. Co.*, 252 U.S. 341 (1920)	10
Radio Station WOW, Inc., et al v. *Johnson*, 326 U.S. 120, 128 (1945)	11
Santana v. *Salinas*, 54 P.R.R. 109 (1939)	7
Texaco P. R. Inc. v. *Treasurer of Puerto Rico*, decided C.A. 1st. June 7, 1962	9

Page

Uphaus v. *Wyman*, 364 U.S. 388 (1960) 11
Utley et al. v. *St. Petersburg*, 292 U.S. 106, 110 (1934) 11
West India Oil Co. v. *Treasurer*, 311 U.S. 20 (1940) 9

Miscellaneous

Act No. 59 of June 10, 1955 10
Act No. 70 of March 9, 1911, Sec. 2, 32 L.P.R.A. 1282, 3, 6, 13
Act No. 85 of August 20, 1925, Sec. 16, subsection 8(a) 3
Code of Civil Procedure of Puerto Rico:
Sec. 8, 31 L.P.R.A. 8 6
Sec. 295, 32 L.P.R.A. 1281 6
Sec. 295(1), 32 L.P.R.A. 1281(1) 3, 13
Sec. 296, 32 L.P.R.A. 1283 3, 7, 13
Sec. 320, 32 L.P.R.A. 1431 7, 8
Sec. 320(1), 32 L.P.R.A. 1431(1) 3, 14
Sec. 321, 32 L.P.R.A. 1432 3, 7, 14
Constitution of the United States, Fourteenth Amendment 10
Internal Revenue Act, Sec. 8(a), 13 L.P.R.A. 1040 9
28 U.S.C. Sec. 1258, 75 Stat. 417, Public Law 87-189 2

In the
Supreme Court of the United States

OCTOBER TERM, 1961

No. 900

TECON CORPORATION,
PETITIONER,

v.

SECRETARY OF THE TREASURY OF THE COMMONWEALTH OF PUERTO RICO,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinions of the Supreme Court of the Commonwealth of Puerto Rico are unreported and are printed in the Supplement to Petition for Writs of Certiorari,[1] Appendix *B* and *C*.

[1] Hereinafter called the Supplement.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under the provisions of Public Law 87-189, 75 Stat. 417, 28 USC Sec. 1258.

The time factors are incorrectly expressed in the petition, though the error does not affect the jurisdiction of this Court. The correct data is as follows. The judgment of the Commonwealth Supreme Court in the first case was entered on December 18, 1961. A motion for reconsideration was denied on January 4, 1962. On March 30th, 1962, by order of Mr. Justice Frankfurter, the time within which to file a petition for a writ of certiorari was extended to April 24, 1962. In the second case, the judgment was entered on December 27, 1961. A motion for reconsideration was denied on January 19, 1962. On April 16, 1962, by order of Mr. Chief Justice Warren, the time for filing the petition was extended to April 24, 1962. For the date of the filing of the petition we rely on the Court's docket.

Questions Presented

Whether the Supreme Court of the United States should review the judgments of the Supreme Court of the Commonwealth of Puerto Rico when (1) the federal questions alleged to be involved were first presented in the *Petition for Writs of Certiorari* before this Court;[2] (2) it appears from the record that the decisions of the Commonwealth Court rested on adequate non federal grounds.

Statutes Involved

Petitioner has printed a rather large number of statutory provisions in the Appendix *A* of the Petition. We submit that the statutes involved in this case are the following:

---

[2] Hereinafter referred to as "the Petition."

As to the case decided on January 4, 1962:

Code of Civil Procedure of Puerto Rico, Section 295 (1), 32 L.P.R.A. 1281 (1); Act No. 70 of March 9, 1911, Section 2, 32 L.P.R.A. 1282; Code of Civil Procedure of Puerto Rico, Sections 296, 32 L.P.R.A. 1283; 320 (1), 32 L.P.R.A. 1431 (1) and 321, 32 L.P.R.A. 1432.

As to the case decided on January 19, 1962:

Section 16, subsection 8(a) of Act No. 85 of August 20, 1925 (Internal Revenue Act) as amended.

They are printed in the *Appendix*, infra.

Statement

Petitioner, a Delaware corporation authorized to do business in Puerto Rico, introduced in the Commonwealth during the years 1952 and 1953 "construction equipment, trailers, quarry equipment, house trailers and other similar contrivances"[3] for which it paid the sum of $37,345.38 as excise taxes. Having paid it petitioner requested its refund but the claim before the Secretary of the Treasury was denied except in the amount of $526.63.

Petitioner then filed a complaint in the Superior Court of Puerto Rico, San Juan Part, in which it prayed that the amount of $37,345.38 be refunded. The legal basis invoked has been summarized by Mr. Justice Perez-Pimentel in the opinions delivered by him in the cases sought herein to be reviewed. He stated:

> "The taxpayer based its claim for refund on the following grounds: (1) the excise taxes collected were

[3] *Record*, Letter of June 7, 1955, from the Secretary of the Treasury to petitioner.

a tax on importation, prohibited by law; (2) the tax was imposed exclusively on the introduction of articles and appliances, the use of such equipment not having been taken as a basis for the imposition of excise taxes; (3) the tax laws of Puerto Rico are not in force in the federal area of Ramey Base, to which Public Law 819 (76th Congress, October 9, 1940, H. R. 6887) is not applicable; (4) the machinery and equipment of the caliche (limestone) industrial plant was tax-exempt; (5) the compressors propelled by power other than electric power or by fluid gas, were not taxable; the paving breakers were not taxed by the Excise Tax Law, and (6) neither were the house trailers taxed by said Excise Tax Law."[4]

In February 21, 1957, the Superior Court of Puerto Rico rendered its "Opinion and Judgment".[5] At the end of that document the judge rendering the judgment summarized it as follows:

"In summary:

A. The following are denied:

1. The claim of plaintiff based on the fact that the excises collected by defendant have been, in fact, customs duties on the importation of articles; and the action of the Secretary of the Treasury is upheld in denying, on the ground of illegality invoked by plaintiff, the refund of the excises collected on the taxable incident of the introduction of the merchandise under consideration into Puerto Rico.

[4] Supplement, pages 12, footnote 1, and 20, footnote 1.

[5] Supplement, page 2.

2. The claim of plaintiff based on the fact that the affected property were not taxable by virtue of the fact that they were introduced into and used within an area which is under the exclusive jurisdiction of the Government of the United States.

3. The claim of plaintiff in connection with the articles introduced into the country to be used in an industrial installation for the processing of limestone, which in this case has been called 'caliche'.

B. The following claims of plaintiff are granted:

1. As to the compressor propelled by diesel oil.
2. As to the house trailers."

Both parties appealed to the Supreme Court of Puerto Rico. Petitioner's appeal, however, was dismissed for lack of jurisdiction because the appeal was not taken within the statutory time. The opinion of the Supreme Court of Puerto Rico, rendered on December 18, 1961, appears in the *Supplement* at pages 12-17. A motion for reconsideration was denied on January 4, 1962. (*Supplement*, p. 19)

As to the appeal brought by the Secretary of the Treasury the Supreme Court of Puerto Rico decided that the Superior Court did not err in granting the claim of the herein petitioner as to the compressors propelled by diesel oil. However, the Court considered that the Superior Court erred in deciding that the house trailers introduced by the petitioner in Puerto Rico were not subject to the excise taxes. The opinion of the Supreme Court delivered on December 27, 1961, has been printed at pages 20-25 of the *Supplement*. A motion of reconsideration was denied on January 19, 1962. (*Supplement*, p. 25)

Argument

Petitioner is asking this Court to grant writs of certiorari in two cases adjudged by the Supreme Court of Puerto Rico in which no federal questions were presented or passed upon and which were decided exclusively on the basis of local law and on matters of the sole interest of the Commonwealth of Puerto Rico.

Petitioner has designated the two cases as "Case Decided on January 4, 1962", and "Case Decided on January 19, 1962". We will go along with this characterization.

This case was dismissed for lack of jurisdiction.

Case Decided on January 4, 1962.

This case was dismissed for lack of jurisdiction.

The *Code of Civil Procedure of Puerto Rico*—which is substantially the same as that of California, from which it was adopted—provides that an appeal may be taken to the Supreme Court from the Superior Court from a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one month[6] after the entry of judgment (Section 295, 32 L.P.R.A. 1281).

Section 2 of Act No. 70 of March 9, 1911, 32 L.P.R.A. 1282, provides that the Secretary of the Court has the duty to mail a written notice to the losing party or his attorney notifying him of the rendition of the judgment; a copy of such notice shall be filed with the papers in the case. The section goes on to provide that the time within which the appeal may be taken shall begin to run from the date of the filing of such notice among the papers.

According to the record of this case, the notice above-

[6] [m]onths consist of thirty days . . . ." Civil Code Sec. 8, 31 L.P.R.A. 8.

mentioned was filed on March 7, 1957. For that reason the appeal was supposed to be taken on or before April 6, 1957.

Section 296 of the Code of Civil Procedure, hereinafter referred to as the Code, 32 L.P.R.A. 1283, states that an appeal is taken by filing with the Secretary of the Court in which the judgment appealed from is entered a notice stating the appeal from the same and by serving similar notice on the adverse party or his attorney. Petitioner filed the notice of appeal on April 5, 1957, that is, he filed the notice on time, but elected to serve notice to the attorney of the adverse party by mail.[7]

Section 320 of the Code, 32 L.P.R.A. 1431, regulates the service of notice or deliveries of documents stating that it should be made personally to the party or his attorney.

The above-mentioned section 320 reads as follows:

> "If upon an attorney, it may be made during his absence from his office, by leaving the notice or other paper with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and four in the afternoon, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and *if his residence is not known*, then by putting the same, enclosed in an envelope, into the post office, directed to such attorney." (Emphasis supplied).

---

[7] Section 321 of the Code, 32 L.P.R.A. 1432 permits service by mail when the person making the service and the person on whom it is to be made, reside or have their office in different places, between which there is a regular communication by mail. The Supreme Court of Puerto Rico has construed the phrase "different places" stating that persons residing in different places *within the same city* are not included within its meaning. *Santana* v. *Salinas*, 54 P.R.R. 109 (1939).

The Supreme Court of Puerto Rico concluded that "since in the present case the attorneys for the parties had their offices in the same city, plaintiff was obliged to notify its appeal personally to defendants attorney within the statutory term of 30 days. He could only have recourse to the substitute method of service by mail, if the efforts pointed out in Section 320 were unsuccessful," (*Supplement*, page 15). The Court went on to say: "It does not appear from the record that attorney for plaintiff-appellant should have followed these steps or procedure."[8]

Petitioner filed a motion for reconsideration that was denied by the Supreme Court on January 4, 1962. No federal question was presented to the Court. It was alleged that the dismissal deprived petitioner of its right under the Constitution of the Commonwealth of Puerto Rico. The statement made on the motion, to that effect, was the following:

> "[the] Judgment of this Honorable Court by virtue of which the appeal filed by Tecon Corp. was dismissed for lack of jurisdiction deprives the appellant company of its right under the Constitution of the Commonwealth of Puerto Rico, authorized and approved by the Congress of the United States of America and specifically under the clauses of said Constitution which establish equal protection of the laws and due process of law."[9]

---

[8] We read this statement in the light of the Spanish text of the opinion to mean that the Supreme Court of Puerto Rico found that the record did not disclose that the "plaintiff-appellant" had done the things required by the statute to allow appellant to resort to service by mail.

[9] Petitioner discusses at page 17 of the Petition a so-called constitutional question which, it states, the case decided on January 4, 1962, presents. As this case was dismissed for lack of jurisdiction, we do not feel that it should be discussed at this time. Nevertheless, we would like to point out for the accuracy of the record, that the case

It will be remembered from the "Statement", above, that the Superior Court partially granted the herein petitioner's claim stating that the compressors propelled by diesel oil and the house trailers were not subject to the tax imposed by the Internal Revenue Act. The Supreme Court affirmed the judgment as to the compressors and reversed it as to the house trailers.

Petitioner does not take issue with the reasoning of the Supreme Court nor with its construction of the local statute.

Instead, it alleges, for the first time in the *Petition* before this Court, that due process was violated by the Puerto Rican Court because it applied a 1955 statute to the facts of the case which took place during the years 1952 and 1953.[10]

This is not true. The Supreme Court decided that the words "trailers and semitrailers" used in the applicable section of the law (Section 8(a) of the old Internal Revenue Act, 13 L.P.R.A. 1040) included "house trailers". The reference to a law of 1955 was made in footnote five of the opinion in order to illustrate why the phrase "house trailers" was specifically used in that legislation. The Court expressed:

> "While in the amendment to subsection 8(a) of 1955 these vehicles are called by their name, calling them 'house trailers', that is probably due to the fact that they had to be distinguished in some way from trailers and semi-trailers since the latter were exempt from

---

Texaco P. R. Inc. v. *Treasurer of Puerto Rico*, cited by petitioner (*Petition*, page 24) pending in the U. S. Court of Appeals for the First Circuit, has been recently decided on June 7, 1962. The Court of Appeals affirmed the judgment of the Supreme Court of Puerto Rico on the basis of *West India Oil Co.* v. *Treasurer*, 311 U. S. 20 (1940).

[10] *Petition*, First Question, page 26.

excises while the houses on wheels were taxable. (See Act No. 59 of June 10, 1955.)" [11]

In the discussion of the "Second Question, Case of January 19, 1962" petitioner, again for the first time, alleges before this Court a deprivation of its rights under the Constitution of the Commonwealth of Puerto Rico. No federal question is presented.

The so called constitutional issue can be reduced to the following: the Supreme Court of Puerto Rico did not comply with one of the *Rules of Civil Procedure* that states that findings of fact based on oral evidence shall not be set aside unless clearly erroneous, and that due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. Obviously, this is not even a shadow of a constitutional question.

Nevertheless, it is clear from the record that the Supreme Court of Puerto Rico found that the Superior Court judgment was clearly erroneous and reversed it.

Reasons why certiorari should be denied

1. The federal questions were first presented in the "*Petition for Writs of Certiorari*" before this Court. They were not brought up to or passed upon by the Supreme Court of Puerto Rico.

In *Hiawassee Power Co.* v. *Carolina Tenn. Co.*, 252 U.S. 341 (1920) this Court stated at pages 343-44:

> "[For] the Fourteenth Amendment was mentioned only in the trial court. In the Supreme Court of the State no mention was made of it in the assignment of errors; nor was it, so far as appears by the records,

[11] *Supplement*, page 24, footnote 5.

otherwise presented to or passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here. But obviously that was too late. *Chicago, Indianapolis & Louisville Mfg. Co.* v. *McGuire*, 196 U.S. 128, 132."

This Court has also expressed that even questions first presented to the highest State court on a petition for rehearing come too late for its consideration. *Radio Station WOW, Inc. et al.* v. *Johnson*, 326 U.S. 120, 128 (1945); *Hanson* v. *Denckla*, 357 U.S. 235, 243 (1958).

2. Should a conflict exist between the Commonwealth Constitution and local statutes, it must be adjudged by the local courts. *Utley et al.* v. *St. Petersburg*, 292 U.S. 106, 110 (1934). Cf. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

3. It appears from the record that the decision of the Supreme Court of Puerto Rico rested on adequate non federal grounds and for that reason this Court should not take jurisdiction to review the judgment. *Uphaus* v. *Wyman*, 364 U.S. 388 (1960); *Black* v. *Cutter Laboratories*, 351 U.S. 292, 298 (1956); *Radio Station WOW* v. *Johnson*, *supra*; *Utley* v. *St. Petersburg*, *supra*.

This Court has observed in *Gryenough* v. *Tax Assessors*, 351 U.S. 486 (1947) at page 497:

"State courts construe their statutes according to their understanding of state policy and apply them to such situation as their interpretation of the statutory language requires. In so adjudging, they are the final judicial authority upon the meaning of their state law. It is only in circumstances where their judgments collide with rights secured by the federal Constitution that we have power to protect or enforce the federal rights."

The circumstances last spoken of, are not herein present. Thus, the statutory construction of the Supreme Court of the Commonwealth of Puerto Rico should prevail.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for writs of certiorari should be denied.

ARTURO ESTRELLA
Acting Solicitor General
RODOLFO CRUZ CONTRERAS
Assistant Solicitor General
Attorneys for Respondent

Appendix

As to Case Decided on January 4, 1962.

Code of Civil procedure of Puerto Rico,* Section 295 (1) 32 L.P.R.A. 1281 (1)

> "An appeal may be taken to the Supreme Court from the Superior Court:
>
> 1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one month after the entry of judgment."

Act #70 of March 9, 1911, Section 2, 32 L.P.R.A. 1282

> "In all cases in which an appeal may be taken as provided in section 1281 of this title, it shall be the duty of the secretary of the court to mail a written notice to the losing party or his attorney when the judgment from which the appeal may be taken is rendered, notifying him of the rendition of the judgment or the action of the court, and a copy of such notice shall be filed with the papers in the case, and the time within which such appeal may be taken shall begin to run from the date of the filing of such notice among the papers."

Section 296 of the Code, 32 L.P.R.A. 1283:

> "An appeal is taken by filing with the secretary of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the

*Hereinafter called the Code.

same, or some specific part thereof, and serving a similar notice on the adverse party, or his attorney."

Section 320(1) of the Code, 32 L.P.R.A. 1431(1):

"The service of notice or other paper may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and four in the afternoon, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope; into the post office, directed to such attorney."

Section 321 of the Code, 32 L.P.R.A. 1432:

"Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail."

As to the Case decided on January 19, 1962.

Section 16, subsection 8(a) of Act #85 of August 20, 1925, as amended at the time when the introduction of the house trailers into Puerto Rico took place.

"There shall be collected and paid, once only, as an internal-revenue tax on the following articles and on the articles comprised in this section of the law [sections 1031-1068 of this title] sold, transferred, used or consumed in, or introduced into, Puerto Rico:**

"On all vehicles not self-propelling, excepting vehicles expressly manufactured to be drawn by human or animal power, and cars or carts expressly designed to be drawn by mosquito tractors, 'jeeps,' and other similar vehicles for the hauling of agricultural products within the farm, sold, transferred, or used or consumed in, or introduced into, Puerto Rico, a tax of (40) per cent on the selling price in Puerto Rico: *Provided*, That trailers and semi-trailers sold, transferred, or used or consumed in, or introduced into, Puerto Rico, shall be subject to a tax of fifteen (15) per cent on the selling price in Puerto Rico."***

**13 L.P.R.A. 1031.
***13 L.P.R.A. 1040.